

**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc.
SIXTH DIVISION**

DISTRICT COURT

Marie Isaacson :
 :
v. : **A.A. No. 11 - 26**
 :
Department of Labor & Training, :
Board of Review :

ORDER

This matter is before the Court pursuant to § 8-8-16.2 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto. It is, therefore, ORDERED, ADJUDGED AND DECREED, that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Board of Review is AFFIRMED.

Entered as an Order of this Court at Providence on this 27th day of May, 2011.

By Order:

_____/s/_____
Melvin Enright
Acting Chief Clerk

Enter:

_____/s/_____
Jeanne E. LaFazia
Chief Judge

Marie Isaacson

:
:
:
:
:
:

v.

A.A. No. 11-0026

Department of Labor & Training,
Board of Review

FINDINGS & RECOMMENDATIONS

Montalbano, M. This matter is before the Court on the complaint of Ms. Marie T. Isaacson seeking judicial review of a final decision rendered by the respondent Board of Review of the Department of Labor and Training, which held that Ms. Isaacson was not entitled to receive employment security benefits. This matter has been referred to me for the making of Findings and Recommendations pursuant to General Laws 1956 § 8-8-16.2.

FACTS & TRAVEL OF THE CASE

Claimant had been employed by Lois Hollingsworth (Zuzu's Petals) as a sales associate for twenty (20) months. She was discharged on April 27, 2010. She filed for unemployment benefits; however, on June 3, 2010 the Director of the Department of Labor and Training denied her claim, finding Ms. Isaacson had been discharged for disqualifying reasons under General Laws 1956 § 28-44-18. The claimant filed a timely appeal and on October 28, 2010 a hearing was held before referee Stanley Tkaczyk at which the claimant,

the employer, and a witness for the employer appeared and testified. See Referee Hearing Transcript, at 1.

In his November 3, 2010 decision, the referee made the following findings of fact:

2. FINDINGS OF FACT:

The claimant had worked for this employer for a period of twenty months. It was alleged that on April 19, 2010 teenage customers came in, purchased a dress, paid cash, were not given receipt, and that there was no entry of the cash being deposited. In addition, the employer reviewed the ledgers and found that on April 19 and 22, 2010 the ledgers were not properly balanced. However, there was no testimony that monies were missing on April 22, 2010 or any occurrences prior. Based on this review, the employer came to the conclusion that the claimant had stolen the money by not registering the sale of the dress and the claimant was terminated.

Referee's Decision, at 1. Based on these findings, and after quoting the Standard of Misconduct found in RIGL 28-44-18, the Referee made the following conclusions:

***The burden of establishing proved misconduct rests solely upon the employer. *** There has been inconclusive evidence presented to actually establish that the item in question was in fact sold to the customer as opposed to being shoplifted.

Referee's Decision, at 2. Therefore, the Referee determined that the claimant's termination was under other than disqualifying conditions within the meaning of Section 28-44-18 of the Rhode Island Employment Security Act. Referee's Decision, at 2. Accordingly, he reversed the decision of the Director. Referee's Decision, at 2.

The employer filed an appeal and the matter was heard by the Board of Review on February 15, 2011. On February 17, 2011 the Board of Review

issued a unanimous decision which found that claimant was disqualified from receiving benefits because she was terminated for misconduct and was thus denied benefits under Gen. Laws 1956 § 28-44-18 of the Rhode Island Employment Security Act.

Thereafter, on March 15, 2011, the claimant filed a timely pro-se complaint for judicial review in the Sixth Division District Court. On April 28, 2011, this matter was referred to me for the making of findings and recommendations pursuant to Section 8-8-16.2 of the General Laws.

APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically addresses misconduct as a circumstance which disqualifies a claimant from receiving benefits; Gen. Laws 1956 § 28-44-18, provides:

28-44-18. Discharge for misconduct. — An individual who has been discharged for proved misconduct connected with his or her work shall become ineligible for waiting period credit or benefits for the week in which that discharge occurred and until he or she establishes to the satisfaction of the director that he or she has, subsequent to that discharge, had at least eight (8) weeks of work, and in each of that eight (8) weeks has had earnings of at least twenty (20) times the minimum hourly wage as defined in chapter 12 of this title for performing services in employment for one or more employers subject to chapters 42 – 44 of this title. Any individual who is required to leave his or her work pursuant to a plan, system, or program, public or private, providing for retirement, and who is otherwise eligible, shall under no circumstances be deemed to have been discharged for misconduct. If an individual is discharged and a complaint is issued by the regional office of the National Labor Relations board or the state labor relations board that an unfair labor practice has occurred in relation to the discharge, the individual shall be entitled to benefits if otherwise eligible. For the purposes of this section, "misconduct" is defined as

deliberate conduct in willful disregard of the employer's interest, or a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence. Notwithstanding any other provisions of chapters 42 – 44 of this title, this section shall be construed in a manner that is fair and reasonable to both the employer and the employed worker.

In the case of Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984), the Rhode Island Supreme Court adopted a definition of the term, “misconduct,” in which they quoted from Boynton Cab Co. v. Newbeck, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941):

‘Misconduct’ * * * is limited to conduct evincing such willful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employee’s duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed ‘misconduct’ within the meaning of the statute.

The employer bears the burden of proving by a preponderance of evidence that the claimant’s actions constitute misconduct as defined by law.

STANDARD OF REVIEW

The standard of review is provided by Gen. Laws 1956 § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

42-35-15. Judicial review of contested cases.

* * *

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court “* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are ‘clearly erroneous.’”¹ The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.² Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.³

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200, 200 A.2d

¹ Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing R.I. GEN. LAWS § 42-35-15(g)(5).

² Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

³ Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213, 215 (1968). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

595, 597 (1964) that a liberal interpretation shall be utilized in construing the

Employment Security Act:

* * * eligibility for benefits is to be determined in the light of the expressed legislative policy that “Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which declared purpose is to lighten the burden which now falls upon the unemployed worker and his family.” G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the circumstances. Of course, compliance with the legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

ISSUE

The issue before the Court is whether the decision of the Board of Review (reversing the decision of the Referee) that claimant was disqualified from receiving benefits due to misconduct was supported by reliable, probative, and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law.

ANALYSIS

If in fact the claimant did not reconcile the cash receipts at the end of the work day in question and/or she did not complete the day’s end summary, and if she did not give the customer a receipt for her purchase of a dress with cash on the workday in question, these would be serious deviations from the store’s established procedures and adverse to the best interests of the business,

clearly justifying the claimant's termination for misconduct and her disqualification from receiving unemployment benefits.

At the hearing before the referee, the employer described the required procedure when a customer pays cash to a sales associate for store merchandise, in this case a dress. The claimant agreed that if there were a cash purchase she would be required to give the customer a receipt, but disagreed that the customer in question bought the dress in question and paid for it with cash. The claimant admitted that she was responsible for reconciling the day's receipts at the end of her work day, but that on the day in question she did not prepare the required day's end sales summary, nor did she reconcile the day's receipts. Board Hearing Transcript, at 26. She did not sign the ledger book and she did not count the drawer at the end of the work day. Referee Hearing Transcript, at 11-13.

At the hearing before the Board of Review the employer produced additional evidence that the dress in question was in fact purchased for cash (as opposed to being shoplifted) and that the purchaser's mother returned the dress and received a refund. Board Hearing Transcript, at 30. The Board's decision gives great weight to the statement from the alleged purchaser of the dress that the dress was put into a plastic hanger bag, secured at the bottom. When the dress was returned, it was in a plastic hanger bag similar to that which the employer uses to package such items and there was no sales receipt. Board of Review Decision, at 1. Clearly, the Board was correct in finding that the claimant's failure to give a receipt for a dress which was purchased with

